

December 6, 2021

Ms. Undine Kipka
Environmental Engineer
U.S. Environmental Protection Agency - Region 1
5 Post Office Square (mail code 05-2)
Boston, MA 02109-3912

Subject: Draft Outer Continental Shelf (OCS) Air Permit for South Fork Wind (OCS-R1-04)

Dear Ms. Kipka,

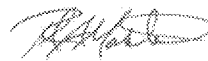
South Fork Wind, LLC (SFW) respectfully submits the attached comments on the revised Draft OCS Air Permit (OCS-R1-04) dated October 20, 2021. SFW's comments are provided in enclosed Attachments A and B. Attachment A includes SFW's comments specifically on EPA's approach regarding the removal of requirements associated with construction emission offsets. Attachment B provides comments, corrections, and clarifications on the revised draft permit and fact sheet. Attachment B is organized in a spreadsheet with reference columns providing the permit page number and condition in which the comment is regarding.

Thank you for your consideration. Please contact me if you have any questions or would like additional information.

Sincerely,



Melanie Gearon
Authorized Person
Orsted Wind Power North America LLC,
Agent for South Fork Wind, LLC



Rob Mastria
Authorized Person
Orsted Wind Power North America LLC,
Agent for South Fork Wind, LLC

Cc:

Patrick Bird, U.S. EPA
Rob Soden, Environmental Manager, Orsted
Brandi Carrier, Project Coordinator, BOEM
Joy Prescott, Project Manager, Stantec

Enclosures:

Attachment A – Comments on the Construction Emission Offset Revisions to the Draft OCS Air Permit (OCS-R1-04) for South Fork Wind, LLC

Attachment B – Comments on the Revised Draft OCS Air Permit (OCS-R1-04) and Factsheet for South Fork Wind, LLC

**South Fork Wind, LLC Comments
On
Revised Draft Outer Continental Shelf Air Permit OCS-R1-04**

South Fork Wind, LLC (SFW) is submitting the following comments on the revised draft Outer Continental Shelf Air Permit OCS-R1-04 that EPA issued on October 20, 2021. The revised draft permit proposes to remove from the initial draft permit issued on June 24, 2021, the requirements to secure offsetting emission reductions for the emissions attributable to the construction of the proposed windfarm (referred to herein as “construction emissions”). In addition, EPA’s proposal is seeking to make various technical corrections to the initial draft permit, including the correction of “typographical errors” and the inclusion of several provisions that were “inadvertently omitted from the initial draft permit.” SFW’s comments on EPA’s proposed corrections to that draft permit are included in Attachment B. The following comments focus on EPA’s proposed removal of construction emission offset requirements from the draft SFW air permit. SFW supports that proposal, for the reasons explained below.

There are two key issues relevant to EPA’s proposal to remove the offset requirements from the air permit for SFW’s proposed windfarm (SFW project or SFW facilities). The first issue is whether the Clean Air Act (CAA or Act) requires new and modified major stationary sources – located either onshore or offshore – to obtain construction emission offsets as a condition for the issuance of pre-construction review permits under the Nonattainment New Source Review (NNSR) program. The second issue is whether CAA section 328 itself imposes a construction emission offset requirement on offshore sources even if the other provisions in the Act do not generally require emission offsets for construction emissions.

As discussed below, the answer to the first issue is that the CAA does not specifically require offsets for construction emissions. The statutory text as well as the structure and purpose of the CAA support EPA’s reasonable interpretation to require offsets only for those emission increases resulting from the operation of the source (referred to herein as “operating emissions”). Based on this interpretation, EPA (as well as states) have historically never required onshore new and modified major stationary sources to obtain construction emissions offsets under the NNSR permit program. With respect to the second issue, nothing in section 328 of the Act requires EPA to change its longstanding practice of requiring offsets for only those emissions resulting from the operation of the source. In fact, the language in section 328 precludes such a contrary interpretation given that the statute expressly requires EPA to impose on offshore Outer Continental Shelf (OCS) sources the “same” offset requirements as would be applicable to onshore stationary sources. Given that both EPA (and states) have interpreted the statute to require onshore stationary sources to secure offsets only for their operating emissions (and not their construction emissions), EPA must impose those same offset requirements on OCS sources under CAA section 328. For these reasons, the revised draft permit is consistent with section 328 and the NNSR requirements.

I. THE CAA DOES NOT REQUIRE CONSTRUCTION OFFSETS AND ONLY AUTHORIZES EPA TO ESTABLISH THOSE REQUIREMENTS THAT ARE THE “SAME” AS THOSE IMPOSED ON SOURCES IN CORRESPONDING ONSHORE AREAS.

The CAA does not specifically speak to the precise issue of what types of emissions increases are subject to the offset requirements for the issuance of a construction permit under the NNSR program. Nowhere in the statute is there a requirement that offsetting emission reductions must be obtained for the emissions increases resulting from the construction of a new or modified major stationary source. Rather, CAA section 173(a)(1) only requires that “sufficient offsetting emission reductions have been obtained ... so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress” for ensuring attainment of the applicable national ambient air quality standards (NAAQS). Similarly, CAA section 173(c) only establishes the rules for “comply[ing] with any offset requirement in effect under this part for increased emissions of any air pollutant” from the new or modified major stationary source. However, the statutory text does not specify which types of emissions increases are subject to the offset requirements. Instead, the Act only establishes general offset requirements, neither stating that they apply only to operating emissions nor specifying that they also apply to construction emissions.

Similarly, nothing in section 328 of the CAA requires OCS sources to obtain offsets for the emissions attributable to the construction of the OCS source. Rather, EPA is only directed in CAA section 328(a)(1) to “establish requirements to control air pollution from Outer Continental Sources ... [in order] to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of Part C of title I.” In the case of new OCS sources located within 25 miles of the seaward boundary (which includes the SFW facilities), “such requirements shall be **the same** as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting” (emphasis added).

Although this statutory language confirms that OCS sources are subject to the air permitting requirements applicable to onshore stationary sources (including the NNSR requirements for offsets), it does not address the issue of whether OCS sources must secure offsetting emission reductions for their construction emissions. Instead, section 328 only states that the requirements for OCS sources shall be “the same” as those applicable to onshore sources. Since, as discussed below, the NNSR program from its inception has only required onshore sources to secure sufficient emission offsets for their operating emissions, section 328 provides no authority for EPA to require OCS sources to secure offsets for the temporary emission increases attributable to the construction of OCS sources. In fact, as discussed in greater detail below, section 328 establishes a requirement that OCS sources must be subject to the same offset requirements as would be applicable to onshore stationary sources – namely requirements to secure offsetting emissions reductions for those emission increases resulting from the operation of source.

II. THE TEXT, STRUCTURE, AND PURPOSE OF THE CAA SUPPORT EPA'S REASONABLE INTERPRETATION THAT AN OFFSET REQUIREMENT DOES NOT APPLY TO CONSTRUCTION EMISSIONS.

EPA's interpretation that offsetting emission reductions are only necessary for the increased emissions attributable to the operation of the newly constructed SFW facilities is a reasonable and logical reading of the statute. While the CAA is silent on the issue of whether the offset requirements apply to construction emissions, the interpretation that such offsets are not required for construction emissions is consistent with the statutory text as well as the structure and purpose of the CAA. Courts grant considerable deference to a federal agency's interpretations when the statute is ambiguous (as it is here) and the agency has adopted a "permissible" interpretation based on the text, framework, and purpose of the statute.¹ Each of these factors, as discussed below, supports EPA's proposed interpretation to limit the application of the offset requirements to only the operating emissions from the proposed OCS source under the CAA.

A. Statutory Text

The CAA contains language on the timing of the offset requirement that supports EPA's interpretation that the offset requirements may only apply to emissions from the operation of an OCS source and need not apply to the emissions associated with the construction of that OCS source. These provisions include:

- CAA section 173(a)(1)(A), which requires the NNSR program to "provide that permits to construct and operate may be issued if . . . the permitting agency determines that by the time the source is to *commence operation*, sufficient offsetting emissions reductions have been obtained . . ." (emphasis added); and
- CAA section 173(c)(1), which requires sufficient offsetting emission reductions to be "in effect and enforceable" "by the time a new or modified source *commences operation*" (emphasis added).

As EPA correctly notes in the Supplemental Fact Sheet for the draft permit amendment, these statutory provisions on the timing of *when* offsets are needed also inform EPA's understanding of *which* types of emissions increases are subject to the offset requirements of CAA 173(c)(1).² In particular, these two statutory provisions generally support EPA's reasonable and logical interpretation that the offset requirements under the NNSR program only apply to the emissions associated with the operation of an OCS source and not the construction of that OCS source.

¹ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984) (*Chevron*) (holding that deference is appropriate where the agency's interpretation was not unreasonable, so long as the statute had not spoken directly to the precise issue at question and the agency's interpretation is consistent with the statutory text, structure, and purpose of the statute).

² Supplemental Fact Sheet at page 9. As a general matter, CAA section 173(c)(1) requires that owners and operators of new or modified major stationary sources must obtain sufficient offsetting emissions reductions from sources located in the same nonattainment area or an adjacent nonattainment area with an equal or higher nonattainment classification.

B. Structure of the CAA

The CAA establishes the same basic structure for the regulation of new and modified stationary sources under various air regulatory programs. Importantly, the overall objective of these programs is to set technology-based performance standards and other requirements for those sources once they are constructed and commence operation.

One air regulatory program is the NNSR program for the permitting of stationary sources located in nonattainment areas under part D of the CAA. The other two are the Prevention of Significant Deterioration (PSD) program for permitting stationary sources under part C of the CAA and the program for setting new source performance standards (NSPS) under section 111(b) of the Act. In the case of all three programs, the air regulatory requirements apply only to new and modified major stationary sources once they commence commercial operation and do not apply to the temporary emission increases resulting from the construction of those sources. This framework informs and further supports the conclusion that Congress' intent to apply the offset requirements in CAA section 173 only to the operating emissions from OCS sources.

This framework is evidenced in CAA section 172(c)(5), which generally requires “new or modified major stationary sources anywhere in the nonattainment area” to secure permits under the NNSR program as a precondition for their construction and operation. It does not require or otherwise specifically authorize the application of the NNSR permitting requirements in CAA section 173 to the actual construction of those new or modified major sources. Similarly, CAA section 165(a)(1) applies the PSD permitting requirements to any “major emitting facility,” while CAA section 111(b) applies the NSPS requirements to new or modified major stationary sources. As noted above, considerable deference is given to a federal agency's interpretation when it is overall consistent with the text, framework, and purpose of the statute.³

Furthermore, the CAA establishes definitions of the terms “major stationary source” and “major emitting source” for determining applicability under each of these air regulatory programs. None of these definitions includes or otherwise refers to temporary activities associated with the construction of the source. Rather, the definition in each case only refers to the stationary source or facility once it has been constructed and begins normal operations.

For example, CAA section 302 contains a general definition of the terms “major stationary source” and “major emitting facility” for all three air regulatory programs. That provision defines these terms to mean “any stationary source or facility of air pollutants which directly emits or has a potential to emit” air pollutants above certain applicable major source emission thresholds specified in the statute. The statute makes no reference to construction or other related activities occurring prior to operation of the source or facility. Instead, the language generally suggests that the applicable major source emission thresholds should be measured from the source or facility based on the projected capacity output of a fully constructed and operating source.

³ See *Chevron*, 468 U.S. at 844-45, 865-66. See also *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (“The reasonableness prong includes an inquiry into whether the agency reasonably filled a gap in the statute left by Congress.”).

Similarly, CAA section 165(1) establishes the definition of the term “major emitting facility” for purposes of determining applicability under the PSD permitting program. That definition speaks in terms of the projected potential capacity of the “stationary source” to emit air pollutants and includes a list of 28 types of stationary sources, such as fossil-fueled steam electric plants, kraft pulp mills, and petroleum refineries, for which the major source emission threshold is set at 100 tons per year (tpy). None of the listed facilities makes any reference to construction activities of any kind. In addition, in the case of other non-listed source categories, the statute only refers to stationary sources or modifications thereto that have a potential to emit 250 tons per year or more of any air pollutant based on their design capacity once fully constructed.⁴

Finally, CAA section 111(a)(3) establishes the definition of the term “stationary source” for purposes of determining applicability under the NSPS program. This definition expressly confirms that the term “stationary source” is limited to only “any building, structure, facility, or installation which emits or may emit any air pollutant.” A stationary source, therefore, does not include emitting activities that are not a building, structure, facility, or installation, such as the temporary activities resulting from the construction of those types of facilities. Notably, the NSPS definition has particular relevance for OCS sources such as the SFW facilities given that CAA section 328 expressly incorporates by reference this definition of stationary source, providing that the term “new OCS source” shall have the same meaning as “a new source within the meaning of section 111(a).”

C. Purpose of the CAA

Requiring emission offsets for only the operating emissions from OCS sources is consistent with the overall air quality goals of the CAA, including the requirements for achieving “reasonable further progress” in nonattainment areas, as provided under sections 171, 172, and 173 of the CAA. Notably, the statute defines the term “reasonable further progress” (RFP) to mean “such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.”⁵ In effect, the RFP requirement allows for slight fluctuations in emissions in the nonattainment area (such as those temporary and relatively minor emissions increases due to construction activities) so long as sufficient emissions reductions are being achieved over the long term in the airshed to assure attainment of the ambient air quality standards by the applicable attainment deadlines.

Based on this statutory framework for achieving RFP and as further discussed in the next section, it has been EPA’s longstanding practice to require emission offsets only for operating emissions from new or modified major stationary sources located onshore. This approach meets the RFP objectives of the Act because requiring emission offsets for an affected source’s operating emissions will assure an overall net emission reduction in the airshed over the long term. By contrast, construction emissions are temporary and transitory in nature, occurring in relatively small amounts for only a short period of time. As a result, these temporary fluctuations in the airshed’s emission levels will not impair the overall RFP objective of achieving the ambient air

⁴ See Sections 169(1) and (2)(C) of the CAA.

⁵ Section 171(1) of the CAA.

quality standards by the applicable attainment deadlines – so long as sufficient emission reductions in the airshed are achieved for offsetting the emissions from the operation of the new or modified source.

From an air quality perspective, there is no practical reason for EPA to deviate from its longstanding practice, particularly with respect to offshore wind (OSW) facilities that must obtain emissions offsets under the NNSR program. As a general matter, the deployment of new OSW facilities may result in small short-term increases in emissions during the construction phase – as with the construction of any new stationary source, be it onshore or offshore. However, the new OSW source would result in an overall net emission reduction in the airshed because of reduced output from, or even shutdown of, existing onshore fossil-fueled generation in the same airshed. This shifting of electric generation from fossil-fueled electric generating units (EGUs) to clean offshore renewable energy resources will result in substantial overall net emission reductions that would be in addition to the emission reductions achieved to offset the emissions from the operation of OSW facility under the NNSR program. In effect, these net emission reductions will help states to meet their RFP requirements for the ozone nonattainment area and thereby promote the achievement of air quality goals of the CAA.

A case in point is the SFW project. The generation of electricity by the SFW project will reduce the need for electricity generated by existing onshore fossil-fueled electric generating plants located in the Ozone Transport Region (OTR) along the Northeast and Mid-Atlantic corridor.⁶ The shifting of electric generation from fossil-fueled generating facilities to renewable energy sources will achieve very substantial air quality benefits for the entire OTR. The table below presents the estimated avoided emissions from the operation of the SFW project on an annual and cumulative lifetime basis. In particular, the table illustrates that the SFW project will displace CO₂, NO_x, SO₂, greenhouse gas emissions (CO₂, N₂O, CH₄) currently produced by onshore generating facilities.

**Estimated Annual and Lifetime Avoided Emissions for
the Operation of the South Fork Wind Project over a 25-year Period**

Pollutant (metric tons)	CO ₂	NO _x	SO ₂	N ₂ O	CH ₄	CO ₂ e
Annual Avoided Emissions	217,653	234	164	1,454	6	798,125
Lifetime Avoided Emissions	5,441,325	5,855	4,091	36,355	147	19,535,130

Note: All units in metric tons. Avoided emissions were based on annual non-baseload outputs and rates for onshore fossil-fueled generation. The estimated annual and lifetime (25 years) emissions avoided were calculated based on 392,500 MW hours (SFW Certificate of Permission, May 2021, Table 4.2-8 (p. 4-55)).

⁶ CAA section 173(c)(1) allows a source to obtain emission offsets from another area only if that area has an equal or higher nonattainment classification than the area in which the source is located and the emissions from that other area contribute to nonattainment in the area where the proposed new or modified source is located. The SFW project would not be subject to these offset requirements if EPA ultimately removes the construction offset requirements as EPA has proposed under the revised draft permit. However, the SFW project would clearly meet these two requirements (if they ever were to apply) given that all areas within the OTR (including Massachusetts and New York) are treated as moderate nonattainment for ozone under the CAA and sources within these OTR areas are by definition contributing to ozone nonattainment throughout the entire OTR airshed.

As BOEM's Final Environmental Impact Statement for SFW recognized, "[a]ir quality in the region could be improved in the long term because an additional operating wind farm would offset emissions from fossil fuel-generated energy sources."⁷ In the case of NOx emissions (the air pollutant subject to the offset requirement in the OTR), the NOx emissions reductions achieved by the SFW project during the first several years would more than fully offset the potential annual NOx emissions estimated to occur during the entire construction phase of the SFW project.⁸ Moreover, these NOx emission reductions would continue to accrue for each and every year thereafter – thereby further promoting the achievement of the RFP goals over the long term as required by the CAA.

Finally, the actual net air quality benefits from the SFW project most likely will be much greater than those achieved by an onshore new stationary source that must secure emissions offsets under the NNSR permit program. Since the SFW facilities would be located offshore many miles from the mainland, the emissions from these facilities are likely to have at most only minimal air quality impacts on onshore areas. This means that the offsetting emission reductions resulting from the curtailment or shutdown of onshore fossil-fueled electric generating sources will not just be mitigating the potential air quality impacts from the SFW facilities, but also enhancing considerably the air quality in the onshore areas in the OTR where the ozone nonattainment problems are the greatest.

III. CAA SECTION 328 REQUIRES EPA TO APPLY THE SAME REQUIREMENTS TO OCS SOURCES AS THOSE THAT APPLY TO ONSHORE STATIONARY SOURCES.

As noted above, section 328(a)(1) of CAA establishes specific requirements for the permitting of OCS sources within 25 miles of shore (such as the proposed SFW facility). One key requirement is that all of the relevant air regulatory requirements, including the NNSR offset requirements, shall be "the same" as those applicable to the corresponding onshore area (COA).⁹ EPA has incorporated this statutory requirement into its OCS air permitting regulation by providing at 40 C.F.R. §55.5(d) that "Offsets shall be obtained based on the applicable requirements of the COA." Furthermore, the D.C. Circuit has interpreted this provision as requiring OCS sources within 25 miles of shore be subject to "identical" requirements as those applicable to sources in the COA.¹⁰

Since the NNSR program from its inception has only required onshore stationary sources to secure sufficient emission offsets for their operating emissions, section 328 provides no authority

⁷ Bureau of Ocean Energy Management, South Fork Wind Farm and South Fork Export Cable Project Final Environmental Impact Statement at H-19 (Aug. 2021).

⁸ EPA OCS-R1-04 Fact Sheet, June 24, 2021., at p.56 of 72 (estimating NOx emission from project construction to be 320 tons).

⁹ CAA section 328 (a)(4)(B) defines the term "corresponding onshore area" to mean, "with respect to any OCS source, the onshore attainment or nonattainment area that is closest to the source, unless the Administrator determines that another area with more stringent requirements with respect to the control and abatement of air pollution may reasonably be expected to be affected by such emissions. Such determination shall be based on the potential for air pollutants from the OCS source to reach the other onshore area and the potential of such air pollutants to affect the efforts of the other onshore area to attain or maintain any Federal or State ambient air quality standard or to comply with the provisions of part C of subchapter I of this chapter."

¹⁰ See *Santa Barbara City Air Pollution Control District v. U.S. E.P.A.*, 31 F.3d 1179, 1180 (D.C. Cir. 1994).

for requiring OCS sources to secure offsets for the temporary emission increases attributable to the construction of OCS sources. Rather, as discussed in greater detail below, EPA must apply existing NNSR regulations, which only authorize EPA to require OCS sources to secure offsetting emissions reductions for operating emissions.

A. Current Federal NNSR Regulations and EPA Longstanding Practice Support EPA’s Proposed Interpretation to Require Emission Offsets Only for Operating Emissions and not for Emissions from Construction Activities

As EPA correctly notes in the Supplemental Fact Sheet for the draft permit amendment, the federal regulations for approving state and local NNSR programs (codified at 40 C.F.R. §51.165) do not address the precise issue of whether the offset requirement applies to construction emissions.¹¹ However, EPA’s proposal to interpret those regulations as only requiring offsets for operating emissions and not construction emissions is both reasonable and appropriate for several reasons. First, EPA’s interpretation is consistent with the statute – specifically the statutory text, as well as the framework and purpose of the CAA as discussed in the preceding section. In addition, it is consistent with the regulatory framework of the NNSR program that is focused on the regulation of new and modified major stationary sources only once they commence normal commercial operation.

It is not surprising that EPA’s NNSR permitting regulations only focus on the regulation of operating emissions and not construction emissions. This approach reflects, as noted above in the prior section, Congress’ intent to establishing a permitting framework for the regulation of only operating emissions from new and modified major stationary sources. A few notable examples of such focus in the NNSR regulations include the following:

- *Stationary source* is defined as the “building, structure, facility, or installation” and makes no reference to the temporary construction activities of the source;¹²
- Definition of *major stationary source* is based on the *potential to emit* NNSR air pollutant(s) based on the “physical and operational design capacity” of the source after it begins normal operations;¹³
- A *major modification* of an existing major stationary source is determined based on comparing the source’s historic baseline emissions to *projected actual emissions* during either a five- or ten-year period after the modification is completed and the source begins normal operations;¹⁴ and
- The exclusion of *secondary emissions* from a source’s potential to emit, which includes those emissions that do not come from the major stationary source or major modification itself.¹⁵

As a general matter, this same permitting framework also is reflected in the federal regulations that EPA itself uses to administer the NNSR program in those areas without an EPA-approved

¹¹ Supplemental Fact Sheet at page 9.

¹² 40 C.F.R. §165(a)(1)(i) (definition of stationary source).

¹³ *Id.* at §165(a)(1)(iii), (iv) (definitions of potential to emit and major stationary source).

¹⁴ *Id.* at §165(a)(1)(v), (xxviii) (definitions of major modification and projected actual emissions).

¹⁵ *Id.* at §165(a)(1)(iii), (vii) (definitions of potential to emit and secondary emissions).

state NNSR program. Codified at 40 C.F.R. Part 51, Appendix S, these regulations are exclusively focused on the permitting and regulation of operating emissions and not construction emissions. Moreover, as EPA correctly notes in the Supplemental Fact Sheet for the draft permit amendment, the Appendix S regulations expressly exclude from the emission offset requirements various types of “temporary emission sources,” including those “emissions resulting from the construction phase of a new source.”¹⁶ This explicit exclusion of construction emissions from the offset requirement reflects the general intent of regulatory framework to exclude temporary emissions from construction activities from the NNSR permitting requirements, including the offset requirements – as reflected both in the statute and implementing regulations.

EPA’s recognition that emissions from construction activities are outside the regulatory scope of the NNSR permitting program is further evidenced by several seminal EPA determinations for the NNSR program. One is an Emission Offset Interpretative Ruling that was later codified in the Appendix S regulations discussed above.¹⁷ Another example is the applicability determination in which EPA determined that the NNSR emission offset policy does not apply to temporary emissions increases from the Bayou Choctaw salt dome project. In particular, EPA concluded that since temporary emission increases from the project would only occur during the filling of the salt dome as a result of “tanker ballasting and barge loading,” the NNSR program (including the emission offset requirements) is not intended “to cover situations where emissions occur for only a relatively short period of time and are associated with the construction of a new project.”¹⁸

B. Massachusetts’ NNSR Rules Only Apply to Operating Emissions and Not to Emissions from Construction Activities.

The Commonwealth of Massachusetts (hereinafter, Massachusetts) is the COA for this permitting action. Consequently, the NNSR requirements that apply to SFW are derived from the Massachusetts NNSR program, which is codified at 310 CMR 7.00, Appendix A. As EPA has noted in the Supplemental Fact Sheet for the draft permit amendment, the relevant NNSR regulations (codified at 310 C.M.R. 7.00, Appendix A) do not specifically address whether the NNSR offset requirements apply to construction emissions from new and modified major sources. However, for the same reasons discussed above for the federal NNSR regulations, the Massachusetts regulatory framework is exclusively focused on the permitting and regulation of operating emissions and not construction emissions.¹⁹ This is evidenced by the requirements for

¹⁶ Supplement Fact Sheet at pages 9-10 (stating that “‘temporary emission sources, such as pilot plants, portable facilities which will be relocated outside of the nonattainment area after a short period of time, and *emissions resulting from the construction phase of a new source*, are exempt from Conditions 3 and 4 of this section,’ in which Conditions 3 and 4 specify the requirements to obtain emission offsets.”) (quoting Section IV.B. of Appendix S).

¹⁷ See 41 Fed. Reg. 55,525 (December 21, 1976).

¹⁸ See EPA Letter to Dr. Robert L. Davies, Federal Energy Administration dated May 6, 1977. Available online at <https://www.epa.gov/sites/default/files/2015-07/documents/emsofst.pdf>; see also EPA Memorandum to Adlene Harrison, Regional Administrator Region VI, from Walter C. Barber, Director, OAQPS dated April 24, 1978. Available online at <https://www.epa.gov/sites/default/files/2015-07/documents/m42478.pdf> (determining that pilot plant would not be subject to the PSD permitting requirements because the PSD program is “not intend[ed] to cover temporary emission sources such as construction-related emission[s] or pilot plants.”).

¹⁹ To the extent that Massachusetts proposed to provide NO_x and VOC emission offsets to offshore wind projects from the closure of the Brayton Point Station power plant, it was only as a means to address anticipated obligations from the EPA-issued permit where Massachusetts was the COA. With the removal of NNSR construction

Reasonable Further Progress as well as Emission Offsets in 310 C.M.R. 7.00, Appendix A (5)-(6), respectively, which only reference emissions during operation. Consistent with these requirements and interpretation, Massachusetts, in practice as the permitting authority, has not historically required offsets for construction emissions in air permits issued under its NNSR program.²⁰

IV. OTHER PROVISIONS IN CAA SECTION 328 DO NOT IMPOSE NNSR EMISSION OFFSET REQUIREMENTS FOR CONSTRUCTION EMISSIONS FOR OCS SOURCES.

Section 328 of the CAA establishes other provisions that delineate EPA's authority for regulating emission sources and activities in the OCS. Those statutory provisions identify which sources and activities are subject to regulation as OCS sources under title I of the CAA as well as specify how those CAA requirements (including the NNSR permitting requirements) apply to OCS sources. As explained below, none of these provisions in Section 328 requires or otherwise authorizes EPA to impose emission offset requirements for construction emissions from OCS sources under the NNSR program. As a result, EPA's proposal to remove the construction emission offset requirement is fully consistent with the provisions of CAA section 328.

A. Section 328 Limits the NNSR Regulation of OCS Sources to Narrowly Defined Circumstances.

Section 328 of the CAA provides EPA with the authority to regulate emissions occurring in the OCS under certain limited circumstances. First, EPA has the authority only to regulate an OCS source, which is defined in CAA section 328(a)(4)(C) as "any equipment, activity, or facility" and may include such activities as "platform and drill ship exploration, construction, development, production, processing, and transportation." Second, the equipment, activity, or facility for an OCS source must—

- Emit or have the potential to emit any air pollutant;
- Be regulated or authorized under the Outer Continental Shelf Lands Act (OCSLA); and
- Be located on the OCS or in or on waters above the OCS.

Based on this statutory framework, EPA's implementing regulations codified at 40 C.F.R. Part 55 further provide that an OCS source may be a vessel only under two limited situations. The first is that the vessel is "permanently or temporarily attached to the seabed and erected

requirements from the OCS air permit for the SFW facility, this new offset policy will provide an important source of NO_x and VOC emissions offsets for the operating emissions from the SFW facility and other offshore wind farms for which Massachusetts is the COA. *See* MassDEP, Draft Emissions Offsets from Brayton Point Station for Outer Continental Shelf Wind Energy Projects at page 3 (July 19, 2019) (MassDEP Draft Offset Policy for OCS Wind Energy Projects).

²⁰ *See* MassDEP Draft Offset Policy for OCS Wind Energy Projects. There are other examples of states not requiring offsets for construction emissions in construction permits issued under EPA-approved NNSR programs. For instance, the State of New Jersey has adopted regulations that expressly exclude construction emissions from the offset requirement under its NNSR permitting program. *See* New Jersey Administrative Code at Title 7, Chapter 27, Subchapter 18.3(h) (stating that "no person is required to secure emission offsets for temporary emission increases that occur during and result directly from the construction, reconstruction, or modification of the newly constructed, reconstructed, or modified equipment or control apparatus").

thereon and used for the purpose of exploring, developing, or producing resources therefrom, within the meaning of section 4(a)(1) of OCSLA.” The second is that the vessel is “physically attached to an OCS source, in which case only the stationary source aspects of the vessels will be regulated.”²¹

Finally, CAA section 328(a)(1) provides for OCS sources located within 25 miles of the seaward boundary (which includes the SFW facilities), the CAA regulatory requirements shall be **the same** as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting” (emphasis added). As noted above, the D.C. Circuit has interpreted this statutory provision as requiring OCS sources within 25 miles of shore be subject to “identical” requirements as those applicable to sources in the COA²²

B. Section 328 Authorizes NNSR Regulation of OCS Source Only When Those Regulations are Identical to the Requirements that Apply in the COA.

EPA must apply the NNSR permitting requirements in a manner that is consistent with the provisions and requirements of CAA section 328 as described above.

Section 328 directs EPA to regulate emissions from OCS sources, which are narrowly defined, but include construction activities. However, that regulation must be identical to what would apply to a major new or modified stationary source that is located in the COA. Consistent with section 328, the NNSR permit may only regulate emissions from construction vessels, such as the imposition of PSD BACT and NNSR LAER requirements, when they meet the definition of being an OCS source. By contrast, it is not appropriate to require NNSR offsets for construction emissions, because such offsets are not required for onshore sources.

EPA already has applied identical NNSR requirements for the SFW project as would be imposed by the COA in most cases, and thus it is reasonable and logical that EPA is issuing the proposed permit amendment to ensure that the NNSR requirements imposed for emission offsets on the SFW project also remain identical to those applied to major sources located on the COA. A review of five main requirements of the NNSR permit program explains whether and how those NNSR requirements apply to the SFW project. Three of those requirements pertain to:

- *Alternative site analysis*, which involves the evaluation of alternative sites, sizes, production processes, and environmental control techniques, and demonstrates that the benefits of the proposed source significantly outweighs the environmental and social costs imposed as compared to those alternatives;²³
- *Compliance demonstration at other facilities*, which documents that all other stationary sources in the state owned or operated by the developer are complying with applicable

²¹ 40 C.F.R. 55.2 (definition of an OCS source).

²² See *Santa Barbara City Air Pollution Control District*, 31 F.3d at 1180.

²³ See 40 C.F.R. Part 51 Appendix S, Section IV, Condition 5.

emissions limitations and standards under the CAA;²⁴ and

- *Public participation*, which requires EPA to provide public notice and opportunity for public hearing and the submission of written comments by interested parties on the proposed stationary source and the draft permit (including data and information in the administrative record in support of permit decision) prior to the issuance of a final permit.²⁵

Notably, the application of these NNSR permitting requirements to the SFW facilities offshore in the OCS meet the requirements of CAA section 328 and EPA's implementing regulations in 40 C.F.R. Part 55. In all cases, the application of these requirements to the SFW project is identical to those that would apply to an onshore new and modified major stationary sources in the COA under the Massachusetts NNSR program, codified at 310 CMR 7.00, Appendix A.

Similarly, the LAER requirements imposed on SFW facilities also are identical to those applied to onshore affected stationary sources. Furthermore, they would apply only when the SFW facilities meet the requirements for being regulated as an OCS source under section 328(a)(4)(C) of the CAA. Specifically, the LAER (as well as the BACT) limitations in the draft OCS air permit would only apply to the SFW vessels when they are "permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing or producing resources therefrom, within the meaning of section 4(a)(1) of OCSLA (43 U.S.C. § 1331 et seq.) or physically attached to an OCS facility, in which case only the stationary source aspects of the vessels will be regulated."²⁶ Again, the application of these identical LAER and BACT requirements is required only when the vessels are OCS sources meeting the requirements of section 328 of the Act.

And finally, EPA's proposal to apply the NNSR emission offset requirements only to operating emissions and not construction emissions is fully consistent with the requirements of CAA section 328 of the CAA. In particular, the offset requirements imposed on the SFW project are identical to the requirements that are imposed on onshore new or modified stationary sources under both EPA and Massachusetts NNSR regulations (as discussed above). In addition, the requirement to secure offsets for operating emissions would apply to only SFW facilities when they meet requirements described above for being regulated as an OCS source under section 328(a)(4)(C) of the CAA.²⁷

²⁴ See *id.* at Appendix S, Section IV, Condition 2. See also Section 173(a)(5) of the CAA (providing that "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification").

²⁵ See Section 165(a)(2) of the CAA (requiring NSR permits provide an opportunity for public hearing and comment).

²⁶ Draft OCS Air Permit for SFW Project, Section III.25 at pages 6-7 (definition of OCS Source Vessel).

²⁷ Although the definition of an OCS source under CAA section 328(a)(4) includes activities relating to construction, development, and transportation, the offset requirements under the NNSR program do not apply to those OCS source activities since only operating emissions are subject to the NNSR offset requirements. In effect, the statutory requirement that the OCS source regulations must be the same as those applicable to onshore sources limits EPA's authority to extend the NNSR offset requirements to only those OCS source activities for which the offset requirements do not apply to onshore sources in the COA under the NNSR program.

Attachment B
Comments on Revised Draft OCS Air Permit (OCS-R1-04) for South Fork Wind
December 6, 2021

Comment No.	Page No.	Condition	Comment
1	10-11	Section IV, Condition C, No. 3, second & third sentences	40 CFR 94.8, which is listed twice in the paragraph, no longer exists in the CFR. According to eCFR, this section was removed on 7/29/21. Please replace with the appropriate section. It appears that most of these regulations have been moved from 40 CFR 94.8 to 40 CFR 1042, Appendix I.
2	12	Section IV. Emission Limits, Condition C. No. 5, Table 2	Make the following corrections to agree with the associated Table 1 in 40 CFR 1043.60(a): <ul style="list-style-type: none"> • Change “n = 130-1999” to “n=130-2000” • Change “n≥2000” to “n>2000” • Change under IMO/EPA Tier I, “1 January 2000” to “1 January 2004”
3	15-16	Section VIII, Nos. 3, 4 and 5	These recordkeeping requirements do not completely align with the list of records contained on page 14 of the Supplemental Fact Sheet regarding “number of cylinders” and “overall engine displacement” versus “cylinder size” in Requirements Nos. 3, 4 and 5 in Section VIII. The EPA engine regulations are based on engine displacement expressed as “liters per cylinder”, as such the recordkeeping requirements should require records with that terminology.
4	15-16	Section VIII, Nos. 4 and 7,	Delete “included in the PTE” and replace with “operating as an OCS source” to reflect the same terminology used in #3 (i.e., “operating as an OCS source”) to avoid confusion of the different terminologies.
5	17	Section VIII, #9.b	The citation for 40 CFR 94.8 no longer exists in the CFR. According to eCFR, this section was removed on 7/29/21. Please replace with a valid section. It appears that most of these regulations have been moved from 40 CFR 94.8 to 40 CFR 1042, Appendix I.
6	17	Section VIII, #9.b	Include the regulatory citation for the source of the NOx emission factors listed in b.i., ii and iii. These factors are not listed in 40 CFR 1042.101 or the former section 40 CFR 94.8 and are higher than even Tier 1 emission standards.
7	17	Section VIII, #9.c	Include the regulatory citation for the source of the emission factor 19.5 g/kW-hr for NOx.

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8	21	Section IX. Nos. 12 and 14	Consider combining requirements to streamline the conditions and they are stating the same requirement
9	Fact Sheet Page 8	Section III, third paragraph	In April 2012, EPA designated Dukes County as nonattainment (marginal classification) for the 2008 ozone standards and designated the remainder of Massachusetts as unclassifiable/attainment. Based on the most recent monitoring data, Dukes County attained the 2008 ozone standard by the 2015 attainment deadline (MassDEP, 2016). This paragraph still indicates that Dukes County is designated as marginal non-attainment for the 2008 ozone standard.
10	Fact Sheet Page 14	#3	In addition to the recordkeeping comments listed under the permit, the fact sheet on Page 14, #3 “Record whether the engines are on a foreign or domestically flagged vessel” is not included in the recordkeeping requirements in Section VIII of the draft permit.